NO. 80-1447

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ALEXANDER L. STEVAS
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

MAX J. ALLEN,
Petitioner,

v.

LINWOOD H. SNOW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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I.

QUESTIONS PRESENTED

1. Whether the inquiry by the state trial judge into the pretrial investigation of prospective jurors being conducted by defense counsel raises any constitutional issue cognizable upon collateral review.

2. Whether the alleged improper cross-examination of an alibi witness not called by the petitioner presents a constitutional claim cognizable upon collateral review.

3. Whether alleged error in certain portions of the final instructions to the jury in petitioner's state court trial raises a constitutional claim cognizable upon collateral review.

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BRIEF FOR RESPONDENT IN OPPOSITION

The respondent Linwood H. Snow respectfully asks that the petition for a writ of certiorari be denied.

Respondent accepts petitioner's statement of jurisdiction, citation of opinions below and statement of the proceedings in the courts below.

STATEMENT OF FACTS

With respect to the facts cited by the petitioner pertaining to the issues which he seeks to raise in this Court, while the respondent is not dissatisfied with that recitation, it is believed that the following additional facts are necessary for an understanding of the issues involved.

The Pretrial Investigation of Prospective Jurors

At no time prior to the jury selection proceedings did defense counsel bring to the attention of the trial judge the fact that they were conducting any type of investigation into the background of the

jurors. During the second day of empanelment, the prosecutor informed the trial judge at a bench conference that the petitioner and his co-defendants were conducting this type of investigation, and that it included personal interviews of the veniremen's neighbors. (2 Tr. 121).

At the time these facts were brought to the attention of the court, defense counsel acknowledged that they had hired investigators to examine the neighborhoods of the veniremen, but stated that the personal interviews which were conducted of the neighbors were done without their authority and without their control. (2 Tr. 121, 123-124, 182-183).

It was against this factual setting that the trial court made certain remarks which form the basis for petitioner's claim of error. The court expressly stated that

defense counsel were "certainly entitled" to conduct neighborhood inspections (2 Tr. 123). The court's sole concern was with the propriety of the neighbor interviews. The court was concerned that if the jurors found out about the interviews, it could have an inhibiting effect on their ability to serve impartially. (2 Tr. 123-124).

There followed a series of bench conferences with counsel concerning the propriety of conducting interviews with veniremen's neighbors while the empanelment continued. At none of these bench conferences did the court order the defense counsel to terminate their investigation of the prospective jurors. Later that same day, defense counsel informed the court that they had ordered the private detectives to cease their investigation (2 Tr. 143-145). It was not until the next

day that any of the defense counsel objected to the remarks made by the trial court regarding the propriety of these interviews (2 Tr. 384).

THE CROSS-EXAMINATION OF THE WITNESS ROSE KOPLOW

The witness Rose Koplow was called as an alibi witness by the petitioner's co-defendant, Martin Koplow. She simply testified on direct examination that on a particular evening in February, 1975, she had been at home with her husband at the time a fire was set in the building in question (10 Tr. 93-94).

On cross-examination, the prosecutor only asked Mrs. Koplow about her location and the receipt of telephone calls with respect to a fire on four other specific dates. After being asked if she recalled where she was on those dates, she was

simply asked "whether or not" she had received a telephone call with respect to a fire (10 Tr. 10-3-104, 108-109, 110-111, 115-116). To each of these questions, the witness Rose Koplow replied that she did not recall. At no time was she asked any questions about the petitioner or his association with the co-defendant Martin Koplow. Furthermore, the jury was instructed after her testimony that none of her testimony was to be applied in the petitioner's case (10 Tr. 114-115).

During the cross-examination, the trial court immediately instructed the jury after the first question was asked by the prosecutor:

> No facts contained in any question that's answered "I don't remember" or "I don't know" or "No" is any evidence whatsoever of the facts contained in the question. (10 Tr. 104).

Not only did the court instruct the jury forcefully during the cross-examination itself, but it also instructed them at length on this issue during the final charge.

> Any question which was asked during the course of the trial where the witness says, " do not know" or "No", or "I do not remember," then the facts contained in such question are, of course, not evidence. This applies especially to the series of answers given by Mrs. Koplow to a series of questions put to her by Commonwealth's counsel regarding a series of telephone calls. Her answer was "I do not remember," "I do not know." So none or the facts contained in those questions are evidence. (11 Tr. 15-16)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE PETITIONER HAS FAILED TO ESTABLISH THAT HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

Neither the Massachusetts Supreme Judicial Court, the District Court nor the Court of Appeals reached the constitutional issue of whether the petitioner was denied the effective assistance of counsel by the action of the trial court in connection with the pre-trial investigation of the veniremen. Indeed, in each court the petitioner principally argued that the action of the trial court denied him the right to an impartial jury. Each reviewing court, upon a full examination of the record, concluded that defense counsel had voluntarily abandoned the investigation and that the trial court's actions were not

responsible for the termination. Petitioner is now attempting to insinuate new facts and issues into the record to have this Court decide an issue that does not reach constitutional dimensions. The petitioner would have this Court articulate a standard for evaluating whether trial counsel has been impermissably deterred from taking legitimate action on behalf of his client. However, he has not in the first instance established that any constitutional right was violated by any action of the state trial court.

Although petitioner argues that the case involves the right to the effective assistance of counsel, the main thrust of petitioner's argument falls unless he can establish he had some constitutional right to have trial counsel engage in a pre-trial investigation of prospective jurors.

Unless this right is established, it can not be said that the action of the trial court deprived petitioner of the effective assistance of counsel.

It is clear that a trial judge has extensive control over the conduct of jury empanelment. See, e.g., Ristaino v. Ross, 424 U.S. 589, 594-595 (1976); Aldridge v. United States, 283 U.S. 308, 310 (1931). To this end, "the judge is not a mere moderator, but is governor of the trial for the purpose of assuring its proper conduct. . . ." Geders v. United States, 425 U.S. 80, 86 (1976). During the empanelment process, a trial judge may permissably curtail any pretrial investigation where such conduct could affect the jury. United States v. Barnes, 604 F.2d 121 (2nd Cir. 1979), cert. denied, 446 U.S. 907 (1980).

None of the cases cited by the petitioner lend support to his novel assertion that trial counsel have an unfettered right to conduct a pre-trial investigation of prospective jurors free from control by the trial judge. While each case involves the right to effective assistance of counsel, they are all distinguishable on the facts. Geders v. United States, 425 U.S. 80 (1976), involved a sequestration order which prevented defense counsel from consulting with the defendant during an overnight recess in the trial. In Holloway v. Arkansas, 435 U.S. 475 (1978), the Court held that three co-defendants had the right to separate trial counsel due to the substantial risk of a conflict of interest. Forcing the defendants to go to trial represented by one attorney in the face of such a

substantial risk denied them the effective assistance of counsel. Finally, in United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977), the defense attorney was forced by the trial court to withdraw his appearance for the defendant in light of an unspecified conflict of interest. The narrow issue presented to the court of appeals was whether this action denied the defendant the right to counsel of his choice, where the trial court did not give the defendant an opportunity to express his opinion on the matter.

Even assuming that petitioner's trial counsel was "subjectively" intimidated by the trial judge to terminate the pre-trial investigation entirely, which none of the courts below found on the record, the petitioner has still not established a constitutional violation. While the

petitioner attempts to couch the issue presented as being one of effective assistance of counsel, it is submitted that any right of counsel to conduct a pre-trial investigation is not an end in itself, but simply a means of acquiring information to intelligently exercise peremptory challenges. The petitioner has made no showing that his trial counsel was impaired or "chilled" in any way in intelligently exercising peremptory challenges on his behalf or otherwise how he was deprived of the effective assistance of counsel during the jury selection process. See United States v. Barnes, supra, at 143.

THE RECORD IS NOT SUFFICIENT FOR SUPREME COURT REVIEW

Even assuming that the petitioner had some right to an unfettered pre-trial

investigation which was impaired by the trial court, review in the instant case would not be prudent. At no time prior to the filing of a petition for writ of habeas corpus in the federal district court did the petitioner allege that his trial counsel was subjectively intimidated by the trial judge into terminating the jury investigation. The first time the subjective motivation of trial counsel was raised was through an affidavit filed in the district court in support of an evidentiary hearing. At that time, the respondent moved to dismiss the petition on the ground that the issue of subjective motivation had never been presented to the state court for review. The District Court dismissed the petition and denied the motion for an evidentiary hearing, ruling that even if subjective intimidation of

counsel were established it would not result in the grant of the writ. The Court of Appeals affirmed the district court's dismissal, holding that the issue of termination of the investigation should be determined on the basis of what the record disclosed and not with what trial counsel may choose to say about what their subjective intent was after the trial.

As a result, this Court does not have any findings of fact as to the subjective motivation of petitioner's trial counsel in terminating the investigation. All that appears is an affidavit of the trial attorney which was never open to the respondent to dispute. On this slim record, where no court made any determination of the actual subjective intent of petitioner's trial attorney, it would be unwise for the Supreme Court to

build constitutional principles on such a weak foundation. This Court would be forced into the position of speculating on the rationale of the defense attorney in terminating the investigation. Speculation is simply not a prudent basis for Supreme Court review.

II. THE PROPRIETY OF THE CROSS-EXAMINATION OF THE ALIBI WITNESS PRESENTS NO ISSUE OF CONSTITUTIONAL MAGNITUDE TO THE PETITIONER.

Habeas corpus relief is generally unavailable to state court prisoners solely on the basis of alleged errors in evidentiary rulings. Lisenba v. California, 314 U.S. 219, 228 (1941); Salemme v. Ristaino, 587 F.2d 81, 85-86 (1st Cir. 1978). Evidentiary rulings, even when found to be in violation of state law, rise to the level of constitutional

violations only when they are so fundamentally unfair as to constitute a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Furthermore, improper cross-examination has rarely been held to raise a federal constitutional claim. See Wilhelmi v. Beto, 426 F.2d 795, 796 (5th Cir. 1970). To rise to constitutional magnitude, the error must "so infuse the trial with inflammatory prejudice as to render a fair trial impossible." Salemme, supra at 85.

In the instant case, the petitioner has failed to demonstrate how his constitutional rights were violated by the alleged improper cross-examination of the alibi witness. This alibi witness was called by a co-defendant (Martin Koplow) to demonstrate that Koplow was at home at the time he (Koplow) had allegedly set fire to

the property at issue. Upon cross-examination by the prosecutor, the witness was asked a series of questions which could be found to relate fires on other properties of the co-defendant Koplow.

No rights of the petitioner were impacted by this cross-examination; indeed, the jury was specifically instructed that none of the alibi witness' testimony applied to the petitioner's case. Furthermore, there was no evidence that the petitioner was associated in any other properties with the co-defendant Koplow. As a result, the petitioner has failed to demonstrate how the jury could have drawn any adverse inferences against him from these questions. See United States v. Davis, 546 F. 2d 617, 620-621 (5th Cir. 1977).

In addition, the alleged error does not rise to constitutional dimensions. Misconduct on the part of the prosecutor to warrant relief must be so prounounced and persistent that it permeates the entire atmosphere of the trial. United States v. Blevins, 555 F. 2d 1236, 1239-1240 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978). In the instant case, the court below carefully scrutinized the effect the questioning may have had on the jury and concluded that the total effect of this one isolated episode in the context of an eleven day trial was not unconstitutionally unfair.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND DECISIONS OF OTHER CIRCUITS

The petitioner claims that the decision by the Court of Appeals is in conflict with the decisions of this Court and other

federal courts relating to prosecutorial misconduct. However, all of the cases relied upon by the petitioner to demonstrate this conflict are inapposite to the issue involved in the instant case; the alleged improper questioning of an alibi witness. All of the cases cited by the petitioner involve the intentional use of false or misleading evidence as part of the prosecution's case in chief.

Miller v. Pate, 386 U.S. 1 (1967), involved a rape-murder trial where the prosecution introduced a pair of defendant's underwear shorts into evidence. These shorts contained stains which were identified by the prosecution as blood of the victim when it was known that the stains were not blood but paint. In Napue v. Illinois, 360 U.S. 264 (1959), the prosecution in a murder trial allowed an

accomplice to falsely testify that he had received no promise of consideration in return for his testimony and did nothing to correct the witness' false testimony. Mooney v. Holohan, 294 U.S. 103 (1934), involved particularly egregious conduct by the prosecutor in knowingly using perjured testimony to convict the defendant.

The petitioner himself concedes that the conduct of the prosecutor in the instant case did not reach the level of misconduct in any of the lower federal court cases he cites on the issue of prosecutorial overreaching. Indeed, the situation is more analogous to the cases of Ketchum v. Ward, 422 F. Supp. 934, 944-947 (W.D.N.Y. 1976), aff'd, 556 F. 2d 557 (2nd Cir. 1977) (improper cross-examination of defense witness did not raise a

constitutional claim) and United States ex rel Cannon v. Moroney, 255 F. Supp. 235, 237 (W.D. Pa. 1966), aff'd, 373 F.2d 908 (3rd Cir. 1967), (improper cross-examination of defendant concerning other crimes did not prevent him from receiving a fair trial). See also United States v. Hyatt, 565 F. 2d 229, 233 (2nd Cir. 1977).

The instant case was not one involving repeated prosecutorial improprieties; rather, the petitioner has extracted only one isolated instance of alleged prosecutorial overreaching in the form of improper questioning of an alibi witness not called by the petitioner during an extended trial. It is clear that none of the cases cited by the petitioner stands for the proposition that an isolated incident of prosecutorial misconduct,

without more, is a violation of the Due Process Clause of the Fourteenth Amendment. Consequently, the decision of the Court of Appeals in petitioner's case is not contrary to precedent of this or other federal courts.

III. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT CONCERNING COLLATERAL REVIEW OF FINAL INSTRUCTIONS TO A JURY.

The Court below, consistent with this Court's admonition in Cupp v. Naughten, 414 U.S. 141, 145-146 (1973), applied a rigorous standard in determining whether the alleged errors in the instructions were constitutionally infirm. The test is consistent with this Court's more recent pronouncement:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

The Court below properly examined the challenged aspects of the charge in the context of the overall charge and concluded that the state trial judge did not remove the fact of the principal accomplice's plea bargain from the jury's consideration in evaluating the credibility of his testimony. Indeed, the petitioner is simply arguing that the conclusion reached by the Court below was erroneous, not that it applied an incorrect standard.

As to the specific errors alleged, none rise to the level of constitutional error when viewed in the context of what is constitutionally required. First, there is no constitutional right to an "accomplice charge." Grieco v. Meachum, 533 F. 2d 713, 720-721 (1st Cir.), cert. denied, 429 U.S. 858 (1976). Second, petitioner has not claimed that any single instruction was an incorrect statement of law; he argues that the "synergistic effect" of certain portions of the charge misled the jury. The petitioner's reliance on Sandstrom v. Montana, 442 U.S. 510 (1979), as authority for his position is misplaced. At issue in Sandstrom was a charge that included a presumption which the Court found the jury may have concluded as being conclusive or as shifting the burden of persuasion to the defendant. No such allegation is made by

the petitioner in the instant case. He has taken one isolated portion of the extended charge, a portion which is conceeded to be a correct interpretation of law, and attempts to make it of constitutional magnitude.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND DECISIONS OF OTHER CIRCUITS AND STATE COURTS.

The petitioner has not alleged any conflict between the decision of the court below with the decision of any federal court which he cites.

In Straus v. United States, 376 F. 2d 416 (5th Cir. 1967), at issue was the refusal of the trial court to give instructions relating to a theory of defense for which there was a foundation in evidence. Similiarly, in Zemina v. Solem, 438 F. Supp. 455 (D. S.D. 1977), aff'd 573 F. 2d 1027 (8th Cir. 1978), the court

granted habeas corpus relief for the failure of the state court to give instructions on excusable or justifiable homicide and self-defense which had a basis in evidence.

None of the cases cited by the petitioner involved instructions regarding credibility of witnesses or accomplices. As a result, the petitioner is merely seeking review of isolated portions of extensive instructions regarding credibility which are not constitutionally infirm.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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